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No. 83-1640

IN THE

Supreme Court of the United States

October Term, 1983

G.C. TEMPLETON, JR. and
MARY PAT TEMPLETON,

Petitioners,

v.

ARSENAL SAVINGS ASSOCIATION,

and

UNITED STATES OF AMERICA,

Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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QUESTIONS PRESENTED FOR REVIEW

Did the Petitioners present and preserve a Federal Constitutional Issue to the trial court, the Court of Appeals of Indiana and the Supreme Court of Indiana?

JURISDICTION

Respondent disputes the allegations of jurisdiction made by Petitioners before this Honorable Court; because there is no foundation whatever for the claims of Federal right relied upon as the basis for invoking the jurisdiction of this Honorable Court, and Petitioners' claims are so wholly unsubstantial and frivolous as to be devoid of any merit.

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STATEMENT OF THE CASE

Petitioners, G.C. Templeton, Jr. and Mary Pat Templeton ("Templetons") statement of the case is false. At the Templetons' request, the trial court found the facts

specially and made extensive conclusions of law. (Templetons' Appendix A-1 through A-25) Templetons failed to preserve or present any error as to the findings of fact or conclusions of law to the Court of Appeals of Indiana by failing to specifically point out any insufficiencies or defects contained therein to the trial court as required by the Indiana Rules of Procedure, TR 59(A)(4) and (8). The Templetons are bound by the facts as found and cannot relitigate them before this Honorable Court.

The operative facts are simple. In August, 1979, the Templetons procured a $150,000 loan from Respondent, Arsenal Savings Association ("Arsenal"), as security for which the Templetons gave their promissory note and the Petitioner, G.C. Templeton, Jr. ("Templeton"), gave a mortgage on certain real property he owns in Marion County, Indiana. (Findings 2 and 3, Templetons' Appendix A-2) The Templetons made the regular monthly payments required by the note until August 27, 1980, after which they made no further payments. (Finding 4, Templetons' Appendix A-2, A-3)

In August, 1980, the Respondent, United States of America ("USA"), filed a Federal tax lien against the Templetons for $199,460. (Finding 26, Templetons' Appendix A-9) The trial court specifically found the fair market value of the real estate to be $275,000 with a monthly net rental value of $2,000. (Record of Proceedings, "RP" 304) Two other judgments in favor of Sam Klain and Sons, Inc. ("Klain") against Templeton are liens against the real estate prior to the claim of Arsenal and the USA. (Findings 22-25, Templetons' Appendix A-8 and A-9)

The combined amount due Klain, Arsenal and USA by Templeton, and a lien on the real estate, as of April 30, 1984, is $529,301.87. ("Arsenal's Appendix A") Templeton has not had any equity in the real estate since the filing of the Federal tax lien in August, 1980, which was the last month in which Templetons made a payment to Arsenal.

The loan was Seven Thousand Nine Hundred Ten Dollars delinquent when Arsenal instituted its action to foreclose the mortgage on February 17, 1981 (Finding 5, Templetons' Appendix A-3) and Twenty-Two Thousand One Hundred Eighty-Four Dollars delinquent, not including the costs of prosecuting the foreclosure, on November 16, 1981, the date the trial court entered its findings of fact and conclusions of law. Had the trial court not entered judgment, the loan would currently be delinquent Sixty-Nine Thousand Six Hundred Eight Dollars.

Templetons state on page (i) under the caption *"PARTIES"* that only Arsenal and Templetons have an interest in their petition. Arsenal submits that the holder of the Klain judgments and the USA also have an interest, since their liens are prior to any interest of Templeton and exceed the value of the real estate.

Arsenal's mortgage was the standard Federal Home Loan Mortgage Corporation form, which gives the borrower the right to reinstate notwithstanding lender's acceleration at any time up to the rendition of judgment in foreclosure. (Finding 30, Templetons' Appendix A-10 and A-11) The Templetons thus had over a year to effect a reinstatement had they so desired. This the Templetons never intended to do, since a reinstatement would have the effect of putting tens of thousands of dollars in the USA's pocket, as the total liens exceeded the value of the property by several hundred thousand dollars. The Templetons and the five different attorneys that they have hired embarked on a course designed to prolong the Templeton's occupancy of the real estate rent-free for as long as possible. To date they have been imminently successful, they are well into their fourth year of rent-free occupancy of a property in which they have not a scintilla of equity. The Templetons and their then three attorneys devised a scheme of "almost" tenders, "near" tenders and "psuedo" tenders in order to prolong the disposition of the case. The facts relating to

these actions are embodied in Findings 31 through 42. (Templetons' Appendix A-11 through A-17)

On January 18, 1982, eleven months after Arsenal's action was commenced, Templetons filed for a change of venue from the judge for cause. (RP 384) Indiana law permits a litigant to obtain an automatic change of venue from the judge upon the filing of an unverified motion without specifically stating the ground therefor. This motion must be filed within ten days after the issues are first closed on the merits. Indiana Code 34-1-13-1, Indiana Rules of Procedure, TR 76(1) and (2) The issues were first closed on the merits on March 27, 1981. (RP 29) Indiana procedure provides for a belated motion for change of venue from the judge "...if the moving party first obtains knowledge of the grounds for change of venue from the county or judge after the time above limited, he may file said application, which must be verified personally by the party himself, specifically alleging when the cause was first discovered, how discovered, the facts showing the grounds for a change, and why such cause could not have been discovered before by the exercise of due diligence." Indiana Rules of Procedure, TR 76(8) Templeton's motion for change of venue from the judge failed to address three of the four requirements. It failed to specifically allege when the cause was first discovered, how it was discovered and why such cause could not have been discovered before by the exercise of due diligence. (RP 384-386)

Even the facts allegedly showing the grounds for the change were wholly inadequate. They include that the trial judge and Arsenal's counsel "had worked together on at least three committees in the Indiana House of Representatives", but failed to point out that this occurred over twenty-one years before. (RP 1145) It alleged that Arsenal's counsel had done business with a corporation in which the judge had been a director and secretary. Templetons filed copies of three deeds to support their contention. One of the deeds was executed over twelve and

one-half years before, and the other two deeds were executed fourteen years before the filing of the motion. (RP 366-370)

An additional ground was that Arsenal's counsel had served as judge *pro tempore* for the trial judge in a single case, for which he would have received the munificent sum of Twenty-Five Dollars per day. Indiana Rules of Procedure, TR 63(D)

Templetons, in their Petition for Writ of Certiorari at page 6, attempt to read something sinister into the use of the pronoun "us". The context in which this reference was made was Arsenal's counsel addressing the court as follows:

> "And we have an affidavit from Mrs. Templeton, Judge, that you're biased and prejudiced, that she didn't get a fair trial. I don't remember ever seeing Mrs. Templeton in this Court Room. She was never at any hearing. She never sat here one day during the trial. She never testified from that witness stand, and when it became an issue, a very vital issue in this case, as to whether Mr. Templeton occupied the house, where she was in a position to come in here and testify whether or not he did, she never appeared, and yet under oath she's charged you with being biased and prejudiced. Now I don't intend to dignify these silly charges that they lay that because you called me Merrill that obviously you were biased and prejudiced either in our favor or in the favor of Arsenal. And they lay another charge on us, that you must be biased and prejudiced because I'm a member of Arsenal. Well, I'm a member of Arsenal along with I think something like forty-eight hundred people, including Mr. Templeton, because anybody who has either a mortgage at Arsenal or has $1.00 in there is a member of Arsenal. They would try to indicate to the Court that I'm a member of some cabal, some mysterious close in-group. Well, that group, I would consider forty-eight hundred, pretty vast and large one. And that's just indicative of the kind of things that they have said

constitute the bias and prejudice of the Court. Was there ever a disgruntled litigant that didn't think that he was a victim of something or the other than the failure of his case." (Record of Proceedings, pages 1137-1139)

This portion of the record points up three facts. One, the Petitioner, Mary Pat Templeton, swore under oath that she had not "received a fair trial before a fair, unbiased, unprejudiced judge" without ever having been present in court for even one moment at any stage of the proceedings.

Templeton, as one of his grounds to demonstrate the bias and prejudice of the judge, stated that the judge had addressed Mr. Moores by his first name. (RP 385) Templetons wisely omit this ludicrous charge in their Petition for Writ of Certiorari before this Honorable Court. The record actually demonstrates that the court addressed Arsenal's counsel as "Mr. Moores" on at least eight occasions. (RP 482, 493, 494, 501, 533, 571, 737, 746) In fact, the court referred to Mr. Fairchild, one of the Templetons' then three attorneys, by his first name "Ray" on at least six occasions, (RP 502, 708, 1038, 1072, 1295, 1296) and Templetons' fourth attorney, Mr. Pactor, as "Jon" on at least six occasions. (RP 1128, 1129, 1130, 1134, 1141, 1143)

The third point is the charge that somehow the trial judge was biased and prejudiced because the attorneys for Arsenal were "members" of Arsenal. Arsenal was a state chartered mutual savings and loan association, and as such, every person who has a deposit in the institution or has attained a mortgage from it is a member. Indiana Code 28-1-21-14

Specification 7 of the "extrajudicial (*sic*) facts" allegedly demonstrating the judge's lack of fairness are again taken out of context. The colloquy which occurred on September 25, 1981 is as follows:

"MR. FAIRCHILD: Your Honor, at this time we would like to show, and I know Court and counsel are

aware of our continuing tender in this case, in open court on the record, mention that tender again at this time.

MR. MOORES: Your Honor, I would like to get that set at rest. I would like to see the money they're talking about. We've heard a lot of talk about how they've got this money and they are willing to tender it in and I haven't seen a dime. Could we see the money? You know, a tender is a tender. You pay the money into the office of the Clerk under the cause number and the Court then decides the disposition of it. And they can call this charade they're going through a tender all they like, but we have not seen the money and I'd like to have the Court ask them to see the money now.

THE COURT: Well, as the Court indicated earlier, the contract provides for the money to be tendered to the plaintiff. It doesn't say anything about going through the Court. I think the record's pretty clear that no money has been presented here in the Court Room and nobody tendered it to the Clerk's office or through the procedures established by statute and so I think the record speaks for itself. I think we are having a charade bringing this up all the time and having to argue about it.

MR. FAIRCHILD: Your Honor, we would respectfully submit that it has not been shown by statute for the record that pursuant to the case law and in fact the contract we are entitled to make tender of the money pursuant to that contract if the plaintiff will accept the money, we will provide the money and they can accept it.

MR. MOORES: He's got the cart before the horse again. He keeps saying we're making a tender, make a tender by producing the money and we haven't seen it.

THE COURT: This has nothing to do with the lawsuit. We're in trial right now. We have been in recess since September 11 and if you wanted to tender the money, you could have tendered it to them. There

being no record that you have done so, the Court assumes you have not done so, you have not tendered it to plaintiff. So, we'll proceed with the trial." (Record of Proceedings, pages 634-636)

What the court makes clear is that if the Templetons did not intend to avail themselves of the opportunity to make a tender in accordance with the statutes of the State of Indiana and the Trial Rules, but intended to rely on that they conceived to be their right to make a tender directly to Arsenal pursuant to the mortgage, then they had had two weeks in which to effect this, and having failed to do so should not interfere with the normal course of the proceedings. (RP 634-636)

On January 18, 1982, Templetons filed their motion for change of venue from the judge for cause (RP 384-386) and a motion to correct errors. (RP 319-323) At a hearing held on February 3, 1982, the trial court set Templetons' motion for change of judge and motion to correct errors for hearing and oral argument on May 8, 1982. At this hearing Arsenal's counsel, Merrill Moores, advised the court and the Templetons' fourth attorney that he would be out of the country from February 11, 1982 through May 4, 1982. (RP 437-443) On February 8, 1982, three weeks after the filing of the motion for change of venue and to correct errors, Templeton served Merrill Moores notice to take his deposition at 10:00 o'clock A.M. on March 5, 1982. (RP 441) March 5, 1982 represented the last business day in which Arsenal's counsel could prepare for the hearing to commence at 9:00 o'clock A.M. on March 8, 1982 on the extensive motions filed by Templetons. Templetons had had over three weeks in which to take Arsenal's counsel's deposition and knowing he would be out of the country for three weeks waited to attempt to thwart Arsenal's attorney being able to prepare for the incipient hearings. The court correctly continued this deposition. (RP 443 through 446)

On March 1, 1982, when Templetons knew that Arsenal's counsel was out of the country and unavailable, Templetons

served a notice to take the deposition of the trial judge one day later, on March 2, 1982. (RP 451) An unheard of procedure! The judge correctly sought the advise of attorneys pursuant to which a verified motion for a protective order was filed by the trial judge (RP 465-466) and correctly issued by an associate presiding judge of the Civil Division of the Marion Superior Court, since only one day's notice of the deposition was given and "Attendance at such deposition constitutes annoyance, embarrassment, oppression and undue burden on him since it would require him to be absent from his scheduled duties as Judge of Marion Superior Court, Civil Division, Room Six." (RP 465)

Similarly, notices to take the deposition of Arsenal's counsel's daughter, Candace L. Morris, and Arsenal's President, Richard Muir, were served on March 1, 1982 (RP 456-457) for attendance at a deposition to be conducted on March 2, 1982. Merrill Moores, the attorney for the persons to be deposed, being out of the country, the court granted a motion continuing the depositions. (RP 463) The court's orders were entirely correct, not only because Templetons had failed to avail themselves of the opportunity to take the depositions for over two weeks when they knew Arsenal's counsel was available, but also because Templetons failed to comply with Indiana Rules of Trial Procedure, TR 27(B), which provides that after the final judgment is rendered in a case, depositions may be taken only upon leave of court.

The court correctly held that the only procedure to present an affidavit for change of judge because of bias and prejudice was through affidavits, and that depositions are not contemplated or provided for. Indiana Code 34-1-13-1.

The Templetons sole presentation of the alleged constitutional issue to the trial court was the statement quoted on page 8 of their Petition for Writ of Certiorari to this Honorable Court: "The judgment should be vacated because Templetons were denied due process of law because of the association between the judge and Arsenal

and Arsenal's attorney Merrill Moores (who also was a member of Arsenal)." It should be noted that there is absolutely no reference to the United States Constitution, to the Federal Constitution or to the Fourteenth Amendment. While it is true, the Templetons filed a thirty-page brief in support of their motion to correct errors (RP 328-357), only four pages of it were devoted to the issue of the alleged denial of due process. In the entire brief the words "Federal Constitution", "United States Constitution", or "Fourteenth Amendment" are never mentioned.

REASONS PETITION FOR WRIT SHOULD BE DISMISSED OR DENIED

TEMPLETONS FAILED TO PRESENT ANY FEDERAL QUESTION TO THE TRIAL COURT, THE COURT OF APPEALS OF INDIANA OR THE SUPREME COURT OF INDIANA.

The sole statement contained in the record in the trial court having any reference to a constitutional issue, be it state or Federal, is the sentence recited on page 8 of Templetons' Petition for a Writ of Certiorari before this Honorable Court which says: "The judgment should be vacated because Templetons were denied due process of law because of the association between the judge and Arsenal and Arsenal's attorney Merrill Moores (who also was a member of Arsenal)." No pleading, motion or brief filed by the Templetons in the trial court make any reference to the Federal Constitution, the United States Constitution or the Fourteenth Amendment.

Templetons, in their 110 page original brief filed in the Court of Appeals of Indiana, never mention the "United States Constitution", "Federal Constitution" or "Fourteenth Amendment". The only statements contained in the brief referable to a constitutional issue are as follows:

> "The essence of the motion was that, at the least, there was an appearance of partiality and a deprivation of

due process because of the association between the judge and Arsenal's attorney and/or the judge and Arsenal. (no citations to any authorities) (Appellants' Brief, page 11)

"Templetons were denied due process of law because the proceedings were void of an appearance of fairness and impartiality and, indeed, were not fair and not impartial." (no citations to any authorities) (Appellants' Brief, pages 55, 56)

"The court deprived Templetons of their constitutional due process rights to a fair trial in a fair tribunal." (no citations to any authorities) (Appellants' Brief, page 93)

"No party, entitled by due process to a fair trial in a fair tribunal, must accept without challenge a judge's statements that he is fair or some relationships are not meaningful. Otherwise, due process, a fair trial, and a fair tribunal are hollow phrases and not sacred principles." (no citations to any authorities) (Appellants' Brief, pages 98, 99)

"Such ex parte communications also violated a fair trial and due process because the judge was basing his rulings on matters outside the evidence presented in court and because it provided Templetons with no notice of those ex parte conversations and of course no opportunity to refute them." (no citations to any authorities) (Appellants' Brief, page 99)

"A fair trial in a fair tribunal is a basic right guaranteed by the constitution." (*In Re Murchison*, 349 U.S. 133, (1955) is cited) (Appellants' Brief, page 101)

"Similarly, the judge should have disqualified himself, not only for the principles of due process, but also for tenets of the Code of Judicial Responsibility." (Canon 2 of the Code of Judicial Responsibility is cited) (Appellants' Brief, page 102)

"Moreover, the appearance of fair trial was so lacking that due process was denied. As the appearance of

partiality was impossible to evade, the "appearance of justice" was impossible to obtain. Accordingly, the entire judgment should be vacated because the judge was not impartial and the Templetons were deprived of their constitutional rights to a fair trial in a fair tribunal." (no citations to any authorities) (Appellants' Brief, page 104)

"The entire proceeding denied Templetons a fair trial and due process of law." (no citations to any authorities) (Appellants' Brief, page 109)

"The appearance of impartiality was lacking, and due process was denied." (no citations to any authorities) (Appellants' Brief, page 110)

In their appellants' brief, Templetons cited thirty-three cases, one court rule, six Indiana statutes, two Canons of Judicial Ethics and two legal tracts. Only two of the thirty-three were federal cases, the balance being Indiana cases.

In Templetons' thirty-seven page reply brief filed in the Court of Appeals of Indiana, the Templetons cited twenty-seven cases, seven Indiana statutes, two Indiana Rules of Procedure and seven legal tracts. All of the cases were Indiana cases with the exceptions of *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), *Brown v. Stackler*, 612 F.2d 1057 (7th Cir. 1980) and *Connecticut General Life Insurance Company v. Gully* (7th Cir. 1982), 668 F.2d 325; none of which has any relevancy to Templetons' contention they were denied due process of law. In Templetons' reply brief the words "United States Constitution", "Federal Constitution", "Fourteenth Amendment" or "due process of law" do not appear at all.

In their petition for rehearing, the Templetons included only the references recited on page 9 of their Petition for Writ of Certiorari before this Honorable Court. No citations to any legal authority in support of their legal contention in this regard were made. In addition, the words "United States Constitution", "Federal Constitution", or "Fourteenth Amendment" do not appear.

In their brief before the Supreme Court of Indiana in support of their petition for transfer, in the Statement of Issues presented in the petition, Templetons recite the two issues contained on page 10 of their Petition for Writ of Certiorari before this Honorable Court; however, issue "(k)" is not mentioned thereafter and is not included in the argument portion of the brief at all. In the argument portion supporting issue "(l)", Templetons cite twelve Indiana cases, two Federal cases (*Foman v. Davis*, 371 U.S. 178 (1962) and *In Re Murchsion*, 349 U.S. 133 (1955), one Indiana Trial Rule and one Judicial Canon of Ethics.

Templetons have failed to comply with the constraints of 28 U.S.C. §1257(3), and thus no substantial Federal question has been adequately presented.

The question of whether the Templetons allegation that they "were denied due process of law" presents any Federal question was directly addressed by this Honorable Court in the case of *Bowe v. Scott*, 233 U.S. 658 (1913). The plaintiff in that case had averred in their complaint "That the ordinance is an attempt to take from your complainants, whose property adjoins and abuts upon the said alley, their rights in and to said alley without due process of law." This Honorable Court, in deciding whether such an allegation presented a Federal constitutional issue, stated on page 665 of its opinion:

> "But it is settled that such an averment, making no reference to the Constitution of the United States, and asserting no express rights thereunder, is solely referable to the state Constitution, which, in this instance, has a due process clause, and affords no basis whatever for invoking the jurisdiction of this court." (citations omitted)
>
> "As from what we have said it results that there is no foundation whatever for the claims of Federal right relied upon as the basis for invoking the jurisdiction of this court, since such claims are so wholly unsubstantial and frivolous as to be devoid of any

merit, it follows that we have not jurisdiction, and the writ of error must be dismissed.

Dismissed for want of jurisdiction"

Indiana has such a provision in its Constitution:

> "All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." Indiana Constitution, Article 1, §12

CONCLUSION

The Respondent submits that Templetons' claims are so wholly unsubstantial and frivolous as to be devoid of any merit. Their petition should be dismissed for want of jurisdiction.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

Appendix

APPENDIX A

JUDGMENTS AND LIENS	TOTALS
Judgment of Sam Klain & Sons, Inc.: Conclusion of Law Petitioners' Appendix 18 (A-18)	
$12,271.90 plus costs 4,136.35 (interest thru Oct. 22, 1981) 2,474.80 (interest thru Apr. 30, 1984)	
$18,883.05 plus costs due as of Apr. 30, 1984	$18,883.05 (plus costs)
Per diem of $2.69 after Apr. 30, 1984	
Judgment of Sam Klain & Sons, Inc.: Conclusion of Law Petitioners' A-19	
$2,500.00 plus costs 726.02 (interest thru Oct. 22, 1981) 506.00 (interest thru Apr. 30, 1984)	
$3,732.02 plus costs due as of Apr. 30, 1984	3,732.02 (plus costs)
Per diem of $.55 after Apr. 30, 1984	
Judgment of Arsenal Savings Association: Conclusion of Law Petitioners' A-19	
$193,724.83 plus costs 1,140.50 (interest to date of judgment) 38,409.33 (interest thru Apr. 30, 1984)	
$233,274.66 (due Arsenal as of Apr. 30, 1984)	$233,274.66 (plus costs)
Per diem of $43.30 after Apr. 30, 1984	

United States Tax Lien recorded August 14, 1980:	
Conclusion of Law Petitioners' A-9	
$199,460.00	
24,116.45 (penalty thru Apr. 30, 1984)	
49,270.04 (interest thru Apr. 30, 1984)	
$272,846.49 due U.S. as of Apr. 30, 1984)	$272,846.49
United States Tax Lien recorded July 16, 1981:	
Conclusion of Law Petitioners' A-10	
$397.58	
52.39 (penalty thru Apr. 30, 1984)	
115.68 (interest thru Apr. 30, 1984)	
$565.65 due U.S. as of Apr. 30, 1984)	$ 565.65
TOTAL JUDGMENTS AND LIENS AS OF APR. 30, 1984	$529,301.87 (plus costs)

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